



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AN87

Tentative Eligibility Determinations; Presumptive Eligibility for Psychosis and Other Mental Illness

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Department of Veterans Affairs (VA) regulation authorizing tentative eligibility determinations to comply with amended statutory authority concerning statutory minimum active-duty service requirements. This document also proposes to codify in regulation statutory presumptions of medical-care eligibility for veterans of certain wars and conflicts who developed psychosis within specified time periods and for Persian Gulf War veterans who developed a mental illness other than psychosis within two years after service and within two years after the end of the Persian Gulf War period. We believe that regulations are necessary because we would interpret the law to allow VA to waive any copayments associated with care pursuant to the statutory presumption and to waive any otherwise applicable minimum service requirements.

DATES: Comments must be received by VA on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free number). Comments should indicate that they are submitted in response to “RIN 2900-AN87, Tentative eligibility determinations; Presumptive eligibility for psychosis and other mental illness.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director, Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461-1599. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: This rulemaking would amend 38 CFR 17.34, “Tentative eligibility determinations,” and would establish a new § 17.109

concerning presumptive eligibility for medical care for psychosis and other mental illness.

Current 38 CFR 17.34 applies to veterans who seek medical care but are not enrolled in the VA healthcare system. Administratively, the rule allows us to provide medical care in specified situations, if “eligibility for [medical] care probably will be established.” Current § 17.34(a), which is not amended by this notice, authorizes such a tentative eligibility determination in emergencies. The vast majority of applicants who have not yet established eligibility but require medical care fall into this category.

Current § 17.34(b) applies in non-emergency situations to a veteran who seeks medical care “within 6 months after date of honorable discharge from a period of not less than 6 months of active duty.” Paragraph (b) authorizes a tentative eligibility determination because of the brief time period between discharge and application. In many of these cases, it is clear that the condition for which the veteran seeks care is one for which service connection “probably will be established.” However, current paragraph (b) needs to be revised so that the minimum-active-duty period (“6 months of active duty”) complies with the minimum active-duty service requirements set forth in 38 U.S.C. 5303A. Pursuant to section 5303A(a), “any requirements for eligibility for or entitlement to any [VA] benefit . . . that are based on the length of active duty served by a person who initially enters such service after September 7, 1980, shall be exclusively as prescribed in [title 38, United States Code].” Therefore, the current rule would be applicable only to persons who entered a period of service

on or before September 7, 1980, and are seeking eligibility based on that period of service. This requirement would be reflected in proposed paragraph (b)(1). Proposed paragraph (b)(2) would require, for persons who entered service after September 7, 1980, that the applicant meet the minimum service requirements in section 5303A, and have filed their application within 6 months after date of honorable discharge. These revisions merely update our regulation to conform to current law.

We would amend VA's regulation on the provision of care to non-enrolled veterans, 38 CFR 17.37, by adding a paragraph that would authorize VA to provide care to veterans for psychosis and mental illnesses other than psychosis. The provision of this care would be pursuant to 38 CFR 17.109, which we propose to create in this rule and discuss in detail below. The proposal to amend § 17.37 authorizes the subsequent changes we propose in this rulemaking.

We also propose a new § 17.109 that would codify in regulation for the first time two presumptions of eligibility for medical care based on specific diagnoses in certain veteran populations. Pursuant to 38 U.S.C. 1702(a), for the purposes of VA's authority to provide medical benefits under chapter 17 of title 38, United States Code, certain veterans who developed an active psychosis within a time period specified in the statute "shall be deemed to have incurred such disability in the active military, naval, or air service." The effect of a presumption of incurrence means that VA must provide medical care to the veteran as if the condition for which the veteran is treated were service connected. Although VA

complies with this mandate, this statutory authority has never been articulated in a VA regulation.

The National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1708(a)(1), (2), 122 Stat. 3, 493-94 (2008), amended 38 U.S.C. 1702 to create a similar presumption for veterans of the Persian Gulf War who develop a mental illness other than psychosis within two years after discharge from military service and within two years after the last day of the Persian Gulf War. We note that the Persian Gulf War is defined by statute as “the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.” 38 U.S.C. 101(33). No ending date has yet been prescribed.

In proposed § 17.109, we would articulate in regulation the statutory presumptions in 38 U.S.C. 1702. Most of the language of the proposed rule would be virtually identical to that of the authorizing statute; we would merely reorganize it for clarity.

A veteran who receives care from VA for a service-connected disability is not required to pay copayments under 38 CFR 17.108(b), 17.110(c)(2), and 17.111(f). Because the veteran would be receiving care for a condition that is presumed to have been incurred during service, i.e., presumed to be service connected, we believe that section 1702 requires us to waive copayments for this group of veterans. Thus, we would state in the proposed rule that the eligibility for benefits is established under this section “and such condition is exempted from copayments under §§ 17.108, 17.110, and 17.111”.

The section 1702 presumption applies only for the purposes of 38 U.S.C. chapter 17, which establishes VA's authority to provide medical, nursing home, and domiciliary care. In other words, we presume eligibility for the purposes of administering those services that VA is authorized to provide under chapter 17, including but not only the medical benefits package under 38 CFR 17.38, which sets out generally those services that VA may provide.

Thus, the Veterans Health Administration (VHA) may treat the covered disabilities as if they were service connected for purposes of furnishing VHA benefits and, in turn, determine that no copayment is applicable to the receipt of such benefits.

In addition, because we are treating these veterans by presuming that their condition is service-connected, we would clarify in paragraph (c) that minimum active-duty service requirements do not apply to eligibility for care and waiver of copayments established under the proposed rule. As discussed above regarding the proposal to amend § 17.34(b), pursuant to 38 U.S.C. 5303A(a), veterans who entered service after September 7, 1980, are subject to certain minimum service requirements; however, under section 5303A(b)(3)(D), this requirement does not apply "to the provision of a benefit for or in connection with a service-connected disability".

Finally, we propose to amend 38 CFR 17.108, 17.110, and 17.111 to clearly exempt persons eligible for care under proposed § 17.109 from the copayment requirement. Although we would establish such an exemption in § 17.109 itself,

we believe that our regulations will be clearer overall if the exemptions are repeated in the copayment regulations.

VA assumes that the number of veterans who will request eligibility under this rulemaking is insignificant because most veterans will be otherwise eligible for service-connected treatment. The majority of veterans who are already enrolled in the system or eligible for care under 38 U.S.C. 1710 would not be affected by this rulemaking. The potential cohort of veterans who are not enrolled in the system and who are not eligible for care under 38 U.S.C. 1710, but meet the criteria established by the provisions of this rulemaking are insignificant compared to the veterans eligible or enrolled under 38 USC 1710. In addition, the veterans who gain access through this rulemaking do not get the full medical benefits package so it would not be advantageous to gain eligibility through this provision when they are eligible through 38 U.S.C 1710. Therefore, VA assumes the cost associated with this rulemaking to be insignificant and welcomes the public to comment on any of the assumptions used in this analysis.

#### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

#### Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.



### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

### Paperwork Reduction Act

This proposed rule does not contain any collections of information under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This proposed rule would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, under 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles are 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.013, Veterans Prosthetic Appliances; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; and 64.022, Veterans Home Based Primary Care.

### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on February 24, 2012, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and record-keeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Dated: February 27, 2012

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Robert C. McFetridge, Director,  
Office of Regulation Policy and Management,  
Office of the General Counsel,  
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 17 as follows:

## PART 17 -- MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.34 by revising paragraph (b) to read as follows:

### § 17.34 Tentative Eligibility Determinations.

\* \* \* \* \*

(b) Based on discharge. The application is filed within 6 months after date of honorable discharge and:

(1) For a veteran who seeks eligibility based on a period of service that began on or before September 7, 1980, such period must have been for not less than 6 months of active duty.

(2) For a veteran who seeks eligibility based on a period of service that began after September 7, 1980, the veteran must meet the applicable minimum service requirements under 38 U.S.C. 5303A.

(Authority: 38 U.S.C. 501, 5303A)

3. Amend § 17.37 by adding paragraph (k) immediately after paragraph (j) to read as follows:

§ 17.37 Enrollment Not Required—Provision of Hospital and Outpatient Care to Veterans.

\* \* \* \* \*

(k) A veteran may receive care for psychosis or mental illness other than psychosis pursuant to 38 CFR 17.109.

\* \* \* \* \*

4. Amend § 17.108 by adding paragraph (d)(12) to read as follows:  
§ 17.108 Copayments for inpatient hospital care and outpatient medical care.

\* \* \* \* \*

(d) \* \* \*

(12) A veteran receiving care for psychosis or a mental illness other than psychosis pursuant to § 17.109.

\* \* \* \* \*

5. Add § 17.109 to read as follows:  
§ 17.109 Presumptive eligibility for psychosis and mental illness other than psychosis.

(a) Psychosis. Eligibility for benefits under this part is established by this section for treatment of an active psychosis, and such condition is exempted from copayments under §§ 17.108, 17.110, and 17.111 for any veteran of World

War II, the Korean conflict, the Vietnam era, or the Persian Gulf War who developed such psychosis:

(1) Within 2 years after discharge or release from the active military, naval, or air service; and

(2) Before the following date associated with the war or conflict in which he or she served:

(i) World War II: July 26, 1949.

(ii) Korean conflict: February 1, 1957.

(iii) Vietnam era: May 8, 1977.

(iv) Persian Gulf War: The end of the 2-year period beginning on the last day of the Persian Gulf War.

(b) Mental illness (other than psychosis). Eligibility under this part is established by this section for treatment of an active mental illness (other than psychosis), and such condition is exempted from copayments under §§ 17.108, 17.110, and 17.111 for any veteran of the Persian Gulf War who developed such mental illness other than psychosis:

(1) Within 2 years after discharge or release from the active military, naval, or air service; and

(2) Before the end of the 2-year period beginning on the last day of the Persian Gulf War.

(c) No minimum service required. Eligibility for care and waiver of copayments will be established under this section without regard to the veteran's length of active-duty service.

(Authority: 38 U.S.C. 501, 1702, 5303A)

6. Amend § 17.110 by adding paragraph (c)(10) immediately after paragraph (c)(9) to read as follows:

§ 17.110 Copayments for medication.

\* \* \* \* \*

(c) \* \* \*

(10) A veteran receiving care for psychosis or a mental illness other than psychosis pursuant to § 17.109.

\* \* \* \* \*

7. Amend § 17.111 by adding paragraph (f)(9) to read as follows:

§ 17.111 Copayments for extended care services.

\* \* \* \* \*

(f) \* \* \*

(9) A veteran receiving care for psychosis or a mental illness other than psychosis pursuant to § 17.109.

\* \* \* \* \*